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5 BEFORE THE INSURANCE COMMISSIONER  
6 OF THE STATE OF WASHINGTON

7  
8 In the Matter of the Application regarding the  
9 Conversion and Acquisition of Control of  
10 Premera Blue Cross and its Affiliates  
11

OIC Docket No. G02-45

WSMA'S REPLY TO PREMERA'S  
SUBSTANTIVE RESPONSE TO  
WSMA'S REQUEST FOR THE  
DISCLOSURE OF ATTORNEYS' EYES  
ONLY MATERIAL TO ITS EXPERTS

12 I. INTRODUCTION

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14 Premera has abandoned the principal basis for its objections: in its most recent filing, the  
15 company repeatedly swears that it is "not questioning the trustworthiness of these men [the  
16 WSMA experts]." Premera's Substantive Response to WSMA's Request for an Emergency  
17 Hearing Re Disclosure of Attorneys' Eyes Only Materials, p. 9; "I do not question their  
18 trustworthiness" Declaration of Kent Marquardt, Premera's CFO, attached to Premera's  
19 Substantive Response, p. 2.

20 If the trustworthiness of WSMA's expert witnesses is no longer being challenged, then  
21 Premera's specter of rampant unauthorized disclosure must no longer be of concern: it  
22 previously accused the WSMA of "attempting to make a blatant end-run around the prohibition  
23 against disclosing sensitive data", warned that Dr. Collins' "constituents/members, as current

1 and/or future providers of medical services, have much to gain”, and claimed that Mr. Perna, the  
2 WSMA’s Director of Health Care Economics, “would have a field day.” Premera’s Procedural  
3 Response to WSMA’s Request for an Emergency Hearing, p. 1; Premera Letter Objecting to  
4 Disclosure dated October 24, pp. 1-2.

5 Since Premera trusts that the WSMA’s experts will not divulge the material to anyone  
6 else, it is left to argue that the experts will make wrongful use of the material by divulging it to  
7 . . . themselves: “a person cannot divide his/her brain in half, nor can he ‘unring the bell’ once  
8 he/she reads documents that may be of competitive or economic advantage.” Premera’s  
9 Substantive Response, p. 3.

10 No case law, or any legal or medical support for that matter, is provided for this  
11 proposition. Instead Premera rests its compartmentalization theory on “human nature.” Id. at 9.<sup>1</sup>

12 While WSMA’s counsel would derive personal satisfaction from reading a legal brief  
13 with references to Rousseau, Locke, Hobbes, and Kant, these and other authorities have reached  
14 conflicting conclusions on the subject of human nature.

15 Such speculation leads us far astray from the central question: will the experts for the  
16 largest, most comprehensive physician association in our state be allowed to view information  
17 that is essential to the evaluation of the largest, most comprehensive health care transaction in the  
18 state’s history?<sup>2</sup>

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21 <sup>1</sup> Premera’s seems to offer its CFO as an expert on the theory: “it is also the case that neither they [WSMA’s  
22 experts] nor anyone else would be able to compartmentalize the AEO materials, so as to avoid using the information  
in the AEO Materials for competitive and economic purposes other than testifying at the Conversion Hearing.”  
Declaration of Kent Marquardt, p. 2.

23 <sup>2</sup> As Commissioner Kreidler observed, “The transaction under review is like no other that has been conducted under  
Washington’s Holding Company Act.” Commissioner’s Fourth Order, p. 6.

1 II. ARGUMENT

2 The information in dispute is essential because, as the WSMA has already noted, “Given  
3 that Premera has labeled virtually everything of use in the consultants’ reports as ‘AEO’, the  
4 WSMA experts would be left with very little to evaluate.” WSMA’s Reply to Premera’s  
5 Procedural Response, p. 5.<sup>3</sup>

6 Premera makes the misleading claim that its AEO designations must be accepted as true  
7 because the WSMA has not thus far objected to them. Premera’s Substantive Response, p. 6.

8 The Commissioner’s Seventeenth Order is clear that the Interveners are to file their  
9 objections to Premera’s AEO designations on November 3, which the WSMA will do in  
10 conjunction with the other Interveners. That filing will identify numerous instances of apparent  
11 bad faith on Premera’s part, including where it asserted information was “AEO” that already  
12 appeared on its own Web site.

13 While the Special Master may have to resolve *that* dispute at a later date, the WSMA  
14 wanted to bring *this* dispute – about whether its experts can see any AEO – in as narrow and  
15 focused a fashion as possible, to expedite the discovery process. Suffice it to say, for this  
16 purpose, that the WSMA does not accept that all of the information Premera has marked “AEO”  
17 is in fact worthy of protection.

18 By far the most misleading allegation Premera makes is its characterization of the scope  
19 of the WSMA’s role as an intervener. Over and over Premera tries to minimize that role in an  
20 effort to contest the qualifications of the WSMA’s experts:

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21 <sup>3</sup> Of course, it is difficult in a public filing to give specific instances of how vital information has been kept from the  
22 WSMA’s experts in the form of AEO designations. To give one general example, in the “Provider Payment” section  
23 of PriceWaterhouseCoopers’ Economic Impact Analysis of the Proposed Conversion of Premera Blue Cross for the  
State of Washington report, all but three of sixteen paragraphs, and three of ten footnotes, have been marked  
“AEO.”

1 there was no showing by the WSMA that there was any need for these two  
2 individuals to have access to the AEO Materials in the Consultant Reports  
3 in order for them to prepare their reports or to testify on **the subject** for which  
4 the WSMA has been permitted to intervene: ‘reimbursement levels to providers  
5 from Premera, which could have an effect on the adequacy of providing networks  
6 serving the insured public.’

7 Id. at 2 (quoting the Commissioner’s Fourth Order; emphasis supplied).

8 There is no charitable explanation for Premera’s reading of the Commissioner’s order,  
9 which granted the Interveners’ party status. The issue of the WSMA’s role in the review process  
10 is so important, and the distortion of what the Commissioner said so revealing of Premera’s style  
11 of advocacy, that it is worth quoting the order at length:

12 I have determined that the interveners represent significant interests that  
13 will be affected by a conversion of Premera. With respect to those interests, the  
14 interveners will offer information and a perspective that may very well differ from  
15 Premera and the OIC Staff. In addition, the interveners will bring a certain  
16 expertise relevant to their positions as providers and consumers of healthcare.

17 The bounds of intervention, however, are not limitless. The issues each  
18 intervener will be permitted to discover and offer evidence on are constrained by  
19 the following three requirements: (1) the issue must be relevant to the statutory  
20 criteria I am required to consider; (2) the issue must have been articulated by the  
21 intervener in its motion to intervene; and (3) the intervener must have established  
22 to my satisfaction that it can offer information or expertise different or beyond  
23 that being offered by Premera or the OIC Staff ... The legislature has directed me  
to consider, among other things, (1) whether the public will benefit from the  
economies of scale and resources that may occur as a result of the conversion; (2)  
whether the conversion will increase or prevent significant deterioration in the  
availability of health care coverage; (3) whether the future business plans of  
Premera are unfair and unreasonable to subscribers and not in the public interest;  
and (4) whether the conversion is likely to be hazardous or prejudicial to the  
insurance-buying public. On these issues, the interveners have established that  
they can present information, a perspective, and expertise different from or  
broader than that provided by the OIC Staff or Premera. They have satisfied me  
that their interests related to these issues are significant; therefore, they should be  
allowed to participate in these proceedings.

Id. at pp. 3, 7.

1 In the WSMA’s case, it articulated many issues in its intervention motions. The WSMA  
2 filed three motions in its quest for Intervener status: WSMA’s Motion to Intervene,  
3 Supplemental Filing to WSMA’s Motion to Intervene, and WSMA’s Reply to Premera’s  
4 Opposition to Motions to Intervene. In the first motion, the WSMA identified a total of 18 issues  
5 it wanted to examine, including physician reimbursement and ranging from the proposal’s  
6 potential impact on primary care to its possible affect on prescription drug coverage. Motion to  
7 Intervene, pp. 10 – 12. The other two motions dealt in more detail with some of these issues.

8 Thus, the language Premera cites regarding reimbursement is merely an example of an  
9 issue that the WSMA can raise, not the *only* issue it can raise. Id. at 6. Indeed, just two  
10 paragraphs later, the Commissioner illustrates why the Interveners should be granted party status  
11 by raising another issue invoked by the WSMA and others: “it is asserted by interveners that, as  
12 a nonprofit insurer, Premera has played and could continue to play a unique role in providing  
13 insurance to segments of the population that for-profit insurers avoid. If Premera retreats from  
14 some parts of the insurance market, as interveners allege could happen, interveners assert there  
15 will be an affect on the interest of those intervening organizations that provide healthcare  
16 services to the uninsured.” Id. at 6 – 7, see also fn. 4.

17 Premera also offers a skewed view of the experts’ roles. “It would be the height of  
18 naiveté to believe that Dr. Collins” Premera writes, “will be able to forget what he saw wearing  
19 his expert’s hat when he has his negotiating hat on.” Premera’s Substantive Response, p. 4. In the  
20 next paragraph, Premera describes the many ways Dr. Collins could allegedly use the AEO  
21 information to benefit his practice and the Association.

1 The flaw in this argument is that Dr. Collins has no such hat: he does not do any  
2 negotiations with the payers on behalf of his clinic. To the best of his knowledge, Premera takes  
3 the same approach to his clinic's fee schedule as it does with so many other clinics: take it, or  
4 leave it. There simply is no negotiating. Nor does Dr. Collins negotiate other contract terms or  
5 conditions for his clinic.

6 In his role as WSMA President, Dr. Collins has dealt with the Legislature only about the  
7 crisis in obtaining affordable medical malpractice coverage. He has dealt with the State Hospital  
8 Association on that issue as well as about ways to reduce errors in medical care. He cannot recall  
9 dealings with other payers.

10 As Premera is keenly aware, neither Dr. Collins nor Mr. Perna nor anyone else at the  
11 WSMA negotiates reimbursement rates with the insurers - - such activity would be a violation of  
12 anti-trust law.

13 On the infrequent occasions when Mr. Perna has contact with the insurers, his typical role  
14 is to act as a conduit, facilitating the flow of information from a concerned member to the payer  
15 in question. He does not negotiate settlements or resolutions. Mr. Perna does prepare reports, as  
16 Premera mentions, but that hardly means he will let the knowledge of AEO material influence  
17 him after he has expressly agreed he would not.

18 In fact, if Premera were worried about the potential for pecuniary advantage merely based  
19 on a person's job title, it would make more sense to be concerned about one of the consultants  
20 working for a large for-profit enterprise than a temporary president and long-time staffer at an  
21 organization that cannot even negotiate compensation for its members.

1           Premera’s stated commitment to fairness bears closer scrutiny as well. It claims that  
2 disclosure is unfair because “Providing Premera’s AEO Materials to the WSMA would be  
3 incompatible with the checks and balances that exist in a competitive system, where the  
4 providers don’t have access to the insurers’ proprietary financial information and the insurers  
5 don’t have access to the providers’ proprietary financial information.” Id. at 7.

6           Most physicians in the state would be startled by Premera’s interest in “checks and  
7 balances” given the company’s take-it-or-leave-it negotiating tactics. The notion that the balance  
8 of power would somehow tip in the providers’ favor is nonsense for another reason: *providers*  
9 won’t have access to Premera’s proprietary information; only two individuals will.

10           Another example of unfairness, according to Premera, is that the WSMA seeks the  
11 company’s proprietary financial data while wanting “to keep its finances secret from everyone  
12 and to only provide it in camera to the Special Master [.]” Id. at 10, fn. 5. This argument will be  
13 vastly more compelling once the WSMA becomes the largest payer for health care services in  
14 the state, and then seeks to convert to a for-profit corporation.

15           The remaining arguments Premera deploys are no more persuasive. It makes the false  
16 statement that the WSMA did not make a timely request for the AEO disclosure. Id. at p. 2, fn.  
17 3.<sup>4</sup> In truth, the time pressure is the product of a case schedule that compressed the time for the  
18 Interveners’ review and which Premera actively sought to accelerate even further. Only thirty  
19 calendar days were allotted from the time the Interveners received the draft consultant reports  
20 until the time their experts had to produce reports, and three of those days were allotted for  
21 allowing Premera notice for objection; at least twelve more days have been lost to this dispute.

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22           <sup>4</sup> Premera’s response was supposed to be limited to substantive issues, but here and elsewhere in its latest brief it  
23 raised procedural objections, which the WSMA regards as neither timely nor persuasive.

1 Premera dismisses the comparison with its treatment of the other Interveners as “a *non*  
2 *sequitur*.” Id. at 10. What is relevant is that the WSMA used identical language in its disclosure  
3 notice, yet Premera never complained, as it does here, that the requests lacked specificity. Id. at  
4 8. It is reasonable to infer, then, that the notice the WSMA used was not defective.

5 As for the use to which a specific report will be put, the WSMA again is in the position of  
6 not being able, in a public filing, to use a specific AEO extract from a report to demonstrate its  
7 utility to its experts. What it can do is give a general example: the anti-trust reports might seem  
8 on the surface to be the province of anti-trust experts, yet Dr. Collins can attest to the impact  
9 Premera’s acquisition of MSC has had in Eastern Washington. That acquisition gave Premera  
10 near-monopoly buying power in that market. The Attorney General’s Office is looking at the  
11 MSC deal to determine if it might be a harbinger of things to come if the conversion were  
12 approved.

13 Perhaps most curious of all is the company CFO’s endorsement of a dubious approach to  
14 presenting a case, without revealing anything about his litigation expertise, or even if he is a  
15 lawyer: “The WSMA’s attorneys have access to the AEO materials and, with such access, they  
16 can protect and promote the interests of the WSMA as an Intervenor in the Conversion Hearing.”  
17 Declaration of Kent Marquardt.

18 Exactly the opposite is true: it will be far more difficult to “protect and promote the  
19 interests of the WSMA” if its experts are unable to see the vital information necessary to  
20 evaluate discovery, prepare witnesses, or testify at the adjudicative hearing.



1 For these reasons, the WSMA renews its request for the relief sought in its previous  
2 motions related to this dispute, except that it now respectfully asks, in light of the time consumed  
3 in resolving this issue, that the deadline for filing its expert reports be extended to November 24.

4 III. CONCLUSION

5 The WSMA recognizes Premera's legitimate interest in protecting *bona fide* proprietary  
6 information. Its experts have agreed to abide by the terms of the Protective Order, and Premera  
7 concedes there is no reason to distrust them. All the WSMA wants is to be able to participate  
8 fully in the review process, on behalf of patients, and the physicians who care for them.

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10 Respectfully submitted this 3rd day of November 2003.

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